

香港律師會的信頭

Letterhead of THE LAW SOCIETY OF HONG KONG

Practitioners Affairs

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Direct Line :

19 August, 1999

Mr. Alan Siu
Information Technology and
Broadcasting Bureau
1-2/F Murray Building
Garden Road, Central
Hong Kong

Dear Alan,

Re: Electronic Transactions Bill

I refer to your letter dated 8 July 1999 and attach for your further action the Law Society's initial comments on the Bill.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
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REVIEW OF ELECTRONIC TRANSACTIONS BILL (the “Bill”)
(gazetted on 9-7-1999)

Part I - Reference Sources

The following legislative models (some are in Bill stage only) of Australia, Canada, Singapore, U.S.A. and the United Nations have been used as reference sources in formulating the comments below:

Abbv.	Relevant Legislation	Jurisdiction
AUS	Electronic Transactions Bill 1999	Australia
CAN	Uniform Electronic Commerce Act (Draft June 9, 1999)	Canada
SING	Electronic Transaction Act 1998	Singapore
US	Uniform Electronic Transactions Act (Draft, 19 Mar 1999)	U.S.A.
UN	UNICITRAL Model Law on Electronic Commerce	United Nations

Part II - Comments on the Bill

SECTION 2. INTERPRETATION

“electronic record” (電子紀錄) means a record generated in digital or electronic form by an information system, which can be

transmitted within an information system or from one information system to another;

Note:

“Record” has already been defined as “information that is retrievable in a perceivable form”; an “electronic record” itself should not be required to be stored in the information system. There is no similar requirement in US, AUS, CAN, UN or SING definition. In any event, the last phrase “or other medium” is not compatible with “information system”.

A record generated electronically may not be in digital form. None of the above jurisdictions use the word digital in the definition but all of them include “electronic form”. It is suggested that “the electronic form” be included in the definition as well.

“information” (資訊) includes data, text, images, sounds, codes, computer programs, software and databases;

Note:

Typographical error.

“information system” (資訊系統) means a system for generating, sending, receiving, storing or otherwise processing information;

Note:

Suggest to replace the definition by the above one. The original definition only accepts system which “automatically” processes information, etc. It does not cater for a system which does not run “automatically”. Recommend the adoption of the US, AUS and UN definitions as there is no need to define “system” too restrictively. The definition above could be considered as a suitable draft.

“rule of law” (法律規則) includes—

- (a) an Ordinance; or
- (b) the common law or rules of equity;

Note:

There is no need to give a restrictive meaning to rule of law if it is intended to give the widest recognition to electronic transactions. The proposed amendment to paragraph (b) is acknowledged to be a matter of style.

SECTION 3. MATTERS TO WHICH SECTIONS 5, 6, 7, 8 AND 16 ARE NOT APPLICABLE

This Ordinance does not apply to any-

- (a) requirement or permission to give or present information in writing;
- (b) requirement for the signature of a person;
- (c) requirement for information to be presented or retained in its original form;
- (d) requirement for documents, records or information to be retained,

under a rule of law in a matter or for an act set out in Schedule 1, unless that rule of law expressly provides otherwise.

Note:

It is desirable that the entire Ordinance is made not applicable to those stipulated matters or acts

(as set out in *Schedule 1*) as Sections 5, 6, 7, 8 and 16 also refer to other issues in other sections of the Ordinance. If the suggestion is accepted, corresponding amendments should likewise be made to Part III and the respective titles of Schedules 1 and 2.

The following matters or acts could be added to Schedule 1 :

14. Negotiable instruments. [Both SING and CAN include negotiable instruments. If bills of exchange (item 13) are already included, negotiable instruments should not be left out.]

15. Documents of title

Section 6. DIGITAL SIGNATURES

(1) If a rule of law requires the signature of a person or provides for certain consequences if a document is not signed by a person, a digital signature of the person satisfies that rule of law but only if the digital signature is supported by a recognized certificate and is generated within the validity of that certificate.

(2) In subsection (1), “within the validity of that certificate”(在該證書的有效期內) means that at the time the digital signature is generated-

(a) the recognition of the recognized certificate is not revoked or suspended;

(b) if the Director has specified a period of validity for the recognition of the recognized certificate, the certificate is within that period; and

(c) if the recognized certification authority has specified a period of validity for the recognized certificate, the certificate is within that period.

Note:

It is noted that the policy of the Authority is to enable a digital signature (as compared to electronic signature) as an alternative mode of signature. However, it is also noted that none of the US, CAN, AUS or SING model adopts such a restrictive approach; they are all satisfied that an electronic signature will suffice to act as an alternative to a paper signature.

The SING legislation only adds effect to a digital signature generated with a valid certificate as a secure electronic signature, namely, its authenticity and integrity are presumed unless the contrary is proved; an electronic signature will be sufficient as a paper signature.

If the purpose of the Bill is “to promote the development of electronic commerce in Hong Kong”, we should adopt the more convenient and common (although less secure) way of signing an electronic record, namely, by electronic signature rather than by digital signature. “Questions of attributing a signature to a person are matters of fact to be proved separately, if they arise. Often attribution is not in doubt, only the ‘fact’ of whether a signature is present.” (CAN)

The requirement of a digital signature under the proposed arrangement will create an extra hurdle for our foreign counterparts in e-commerce as they must employ those certification authorities licensed under the Hong Kong scheme in doing so. Will the Postmaster General, which is the first and presumably the only recognized certificate authority at the inception of the Ordinance, have the trust of our foreign partners?